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**United States Government Accountability Office
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Decision

Matter of: Yardney Technical Products, Inc.--Costs

File: B-297648.3

Date: March 28, 2006

Jonathan D. Shaffer, Esq., Smith Pachter McWhorter & Allen PLC, for the protester.
Clarence D. Long, III, Esq., Department of the Air Force, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest was not clearly meritorious, and reimbursement of protest costs following agency corrective action therefore is not warranted, where additional record development and substantial further analysis would have been required to resolve protest.

DECISION

Yardney Technical Products, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to Quallion, LLC under broad agency announcement (BAA) No. BAA-04-08-PKM Call 8, issued by the Department of the Air Force for establishment of a domestic supplier of spacecraft-quality rechargeable lithium-ion batteries.

We deny the request.

The BAA identified three program objectives: establish U.S.-owned domestic trusted source(s) of cathode materials; strengthen U.S.-owned domestic industrial base for true prismatic lithium-ion cells and batteries for spacecraft use; and establish U.S.-owned domestic trusted source(s) of other base cell components and their precursors. Proposals were to be evaluated under three factors, listed in descending order of importance--business and technical aspect, cost/price, and proposal risk assessment. Proposals were to be rated as category I--well conceived and technically sound (recommended for acceptance); category II--technically sound, but requires further development (recommended for acceptance but at a lower priority than the first category); and category III--not technically sound or does not meet agency needs. The BAA contemplated the possibility of awarding multiple contracts,

depending upon the evaluated order of merit of competing proposals and the availability of funding.

Four offerors, including Yardney and Quallion, submitted proposals, which were evaluated by the technical team. Both Yardney's and Quallion's proposals were determined to be in category I, with Quallion's considered first in order of merit based on its superior, low-risk technical approach, which included \$7 million in cost sharing. Yardney's proposal was evaluated as acceptable but high-risk, due to uncertainties associated with its technical approach; it did not provide for cost sharing. Since funding ultimately was available for only one award, the agency selected Quallion for award.

In its protest, Yardney alleged that the agency evaluated the proposals based on factors outside the stated evaluation scheme, that its proposal should have been rated superior because it had greater experience and existing manufacturing capability than Quallion, and that Quallion's approach to developing and supplying the raw material was flawed. Yardney further asserted that one of the evaluators was biased in favor of Quallion and had unduly influenced the source selection team. In support of this claim, Yardney cited the fact that the evaluator had traveled to Japan with the firm, while refusing to accompany Yardney on a similar visit, and had offered to support the transfer of a material license to Quallion, without making the same offer to Yardney.

The Air Force filed an agency report that addressed all of Yardney's arguments and included a sworn statement from the allegedly biased evaluator, who was the program manager for battery technology at the National Reconnaissance Office. Agency Report, Tab 10, Statement of Program Manager. The program manager denied any improper influence over the evaluators in favor of Quallion's proposal. Statement of Program Manager, at 3. With regard to his Japan trip, the program manager stated that, approximately 1 year before issuance of BAA Call 8, he recognized the need to ensure supply of a critical cathode material--available from a specific Japanese company--for use in spacecraft-quality rechargeable batteries. Id. at 1. In his experience, Japanese business culture required an introduction from someone with an existing relationship and he knew that Quallion had such a relationship with the Japanese firm. Id. The program manager, who was then serving in that capacity on a contract held by Quallion, discussed his interest in meeting with the Japanese firm, and Quallion offered to make the introduction after an international battery conference that both planned to attend in Japan. Id. at 2. At the meeting with the Japanese firm, the program manager asked the firm if it would consider a technology transfer to U.S. companies. Id. While the Japanese firm was interested, the program manager denied that any definite commitment was made or that he ever supported or assisted in the transfer of a material license to Quallion. Id. at 3. When Yardney later asked for a personal introduction to the Japanese firm, the program manager declined to go to Japan, but arranged for Yardney's

introduction. Id. The program manger believed that Yardney held meetings with the Japanese firm and stated that Yardney thanked him for his assistance. Id.

After receipt of the agency report, Yardney retained outside counsel, who filed a supplemental protest challenging the propriety of the program manager's meeting with the Japanese firm and Quallion. Specifically, Yardney asserted that (1) the BAA improperly failed to identify technology transfer as the favored approach; (2) the meeting was outside "formal procedures" and gave Quallion favored treatment; (3) Quallion obtained inside information and an unfair competitive advantage from the meeting; (4) Quallion's unfair advantage resulted in its elevated--and Yardney's lower--ratings in the evaluation; and (5) the program manager's actions--accepting Quallion's "technical services" through the introductory meeting, failing to ensure a level playing field in the procurement, and providing Quallion with unequal access to information--violated applicable statutes and regulations. Yardney also challenged the evaluation of Quallion's proposed cost share as a strength, arguing that it was "illusory," and asserted that the agency ignored Yardney's significant investment in battery development.

Before our Office obtained a supplemental agency report responding to Yardney's supplemental arguments, the Air Force announced that it was taking corrective action by canceling the current BAA and resoliciting for its requirements. The Air Force noted that the new solicitation would likely state a preferred/lowest risk solution, and that the program manager would not be part of the new evaluation team or selection process. We advised Yardney not to submit its comments on the original agency report, and dismissed its protest as academic.

Yardney requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protests, including reasonable attorneys' fees. Yardney asserts that its protest grounds were clearly meritorious and the agency unduly delayed taking corrective action, as evidenced by its failure to do so until after it filed the agency report on the original protest and Yardney had filed its supplemental protest.¹ Request for Reimbursement at 4. Yardney further asserts that, while the agency took corrective action shortly after the supplemental protest was filed, the corrective action should be viewed as unduly delayed with regard to the supplemental protest because the supplemental protest issues overlapped those raised in the original protest.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that, where the contracting agency decides to take corrective

¹ In addition, while Yardney never filed comments, it asserts that the comments were substantially completed when it was notified of the corrective action.

action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2005). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, we will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.--Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 3. A protest is "clearly meritorious" where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

We find that reimbursement is not appropriate in this case since, even if we agreed with Yardney that the agency's corrective action was not prompt, the protest was not clearly meritorious. In its original protest, Yardney asserted that the evaluation of Quallion's proposal as superior was flawed, that Quallion enjoyed an unfair competitive advantage, as evidenced by the program manager's trip to Japan with the firm, and that the program manager unduly influenced the evaluation panel in favor of Quallion. The Air Force asserts that its response (detailed above) constitutes a defensible legal position with regard to the evaluation and unfair advantage issues based in part on the pre-existing business relationship between the awardee and the Japanese firm. Which party's position is correct is not apparent from the record as it stands. Rather, in order to reach a decision on the matter, we would have required, at a minimum (as was our intention prior to being notified of the corrective action), a supplemental report from the agency and comments on that report by Yardney. Following this further development of the record, we would have had to conduct substantial further analysis of the parties' positions. In such cases, we do not consider the protest grounds to be clearly meritorious. New England Radiation Therapy Mgmt, Servs., Inc.--Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4; LENS, JV--Costs, B-295952.4, Dec. 12, 2005, 2006 CPD ¶ 9 at 5; East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 2-3 (protest not clearly meritorious where decision would have required further steps to complete and clarify the record). We therefore decline to recommend reimbursement of Yardney's protest costs.

Yardney also asserts that it is entitled to reimbursement of its proposal preparation costs. In this regard, Yardney argues that its initial proposal was "wasted" work

because the new solicitation--which was expected to identify technology transfer as the preferred solution--represents a solution different from the one it originally proposed, thus requiring it to completely rewrite its proposal. Request for Reimbursement at 5.

Where we have sustained a protest, we may recommend reimbursement of proposal preparation costs when changed circumstances render a previously-submitted proposal no longer relevant. See COBRO Corp., B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181 at 8-9. However, our Regulations do not provide for recovery of such costs where an agency has taken corrective action. See 4 C.F.R. § 21.8(e); Mapp Building Servs.--Costs, B-289160.2, Mar. 13, 2002, 2002 CPD ¶ 60 at 2. Moreover, we generally will not recommend payment of proposal costs where, as here, the protester will have the opportunity to compete for the requirement under a reopened competition. Moon Eng'g Co., Inc.--Request for Declaration of Entitlement to Costs, B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129 at 7 n.7.²

The request that we recommend reimbursement of costs is denied.

Anthony H. Gamboa
General Counsel

² Notwithstanding Yardney's assertions, moreover, it is not clear to what extent its original solution would have no value under the resolicitation.